

CFTC Issues New Enforcement Guidance on Cooperation Recognition in Its Orders

Skadden

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On October 29, 2020, the Commodity Futures Trading Commission (CFTC) Division of Enforcement (Division) issued a memorandum (Guidance) providing guidance for Division staff to follow when recommending the recognition of an entity's self-reporting, cooperation or remediation in CFTC orders settling administrative enforcement proceedings.¹

The Guidance, which appears to focus primarily on the language to be used in orders that settle enforcement actions, states that it is intended to further the CFTC's recently stated strategic goal of providing clarity. It does not change the Division's existing practices for evaluating self-reporting, cooperation or remediation, including for purposes of recommending penalty reductions, which were set forth in various advisories from January to September 2017 (Advisories).² The Guidance does not touch on, for example, the amount of credit (*e.g.*, with respect to the amount of a penalty discount) the Division will recommend for self-reporting, cooperation or remediation. Instead, for the first time, the Division is formalizing when and how Division staff will recommend self-reporting, cooperation or remediation be "recognized" — *i.e.*, described — in CFTC orders.

The Guidance provides no insight into why the Division decided to issue it now. But it may have been issued because, over time, the commission's orders have used different language to describe what appears to be the same sort of cooperation, giving rise to potential inconsistency from order to order. Indeed, Acting Division of Enforcement Director Vincent McGonagle explained that the Guidance is designed to promote "consistency and transparency across CFTC enforcement actions."³

The Guidance suggests that every enforcement settlement order will fall within one of four categories, depending on the extent of cooperation, and the Guidance dictates specific language to be used in settlement orders to characterize the cooperation for each category. The first category described in the Guidance provides for no cooperation language at all. Specifically, if the settling entity did not, in the view of the Division, self-report a violation, cooperate "in a manner that materially advanced the Division's investigation or otherwise met the factors set out in the Advisories," or remediate, the order will not contain any language regarding these subjects. The Guidance assures, nevertheless, that the absence of such language does not imply that the entity was uncooperative or obstructed the investigation.

The other three categories are framed by increasing levels of cooperation. The first of these is for a non-self-reporting entity that cooperated and/or remediated but did not earn a penalty discount. In other words, the entity's cooperation and/or remediation "satisfied one or more of the factors set out in the Advisories," but the penalty was not reduced as a result. In this instance, the language in the order will state:

In accepting Respondent's offer, the Commission recognizes the cooperation of [name of Respondent] with the Division of Enforcement's investigation of this matter. The Commission also acknowledges Respondent's representations concerning its remediation in connection with this matter.

¹ See CFTC, "[Recognizing Cooperation, Self-Reporting and Remediation in Commission Enforcement Orders](#)" (Oct. 29, 2020).

² See CFTC, "[Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Individuals](#)" (Jan. 19, 2017); CFTC, "[Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations for Companies](#)" (Jan. 19, 2017); CFTC, "[Enforcement Advisory: Updated Advisory on Self Reporting and Full Cooperation](#)" (Sept. 25, 2017). For more on the advisories, see Skadden's October 4, 2017, [client alert](#) and "[Inside the CFTC's New Advisories on Cooperation](#)," an article by David Meister, Mark D. Young and Chad E. Silverman in *Law360* (Feb. 8, 2017).

³ Press Release, "[CFTC's Enforcement Division Issues Staff Guidance on Recognition of Self-Reporting, Cooperation, and Remediation](#)" (Oct. 29, 2020).

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The next category is for a non-self-reporting entity whose cooperation and/or remediation did earn a penalty reduction. To qualify for such recognition, the entity must have cooperated in a way that “materially advanced the Division’s investigation in accordance with the Advisories, and/or engaged in substantial remediation to address the misconduct and materially develop or strengthen related internal controls.”⁴ In this instance, the order will include the following language:

In accepting Respondent’s Offer, the Commission recognizes the substantial cooperation of [name of respondent] with the Division of Enforcement’s investigation of this matter. The Commission also acknowledges Respondent’s representations concerning its remediation in connection with this matter. The Commission’s recognition of Respondent’s substantial cooperation and appropriate remediation is further reflected in the form of a reduced penalty.

⁴ See Guidance at 3.

The final category is reserved for entities that have “self-reported, substantially cooperated in a manner that materially advanced the Division’s investigation, and remediated in accordance with the Advisories,” earning the “most significant” penalty reduction.⁵ In this instance, the order will include the following language:

In accepting Respondent’s Offer, the Commission recognizes the self-reporting and substantial cooperation of [name of Respondent] in connection with the Division’s investigation of this matter. The Commission also acknowledges Respondent’s representations concerning its remediation in connection with this matter. The Commission’s recognition of Respondent’s self-reporting, substantial cooperation, and appropriate remediation is further reflected in the form of a substantially reduced penalty.

Where the Division recommends that an order recognize cooperation and/or remediation, it will also recommend that the order describe the specific acts of cooperation and/or remediation deserving recognition.

⁵ See *id.* at 3-4.

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